Filed 10/26/09 P. v. Latham CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DIANA GRANIER LATHAM, Defendant and Appellant.	C058600 (Super. Ct. No. 06F08879)

A jury convicted defendant Diana Granier Latham of driving under the influence (Veh. Code, § 23152, subd. (a); undesignated section references are to this code; count one) and driving with a blood alcohol content of 0.08 percent or more (§ 23152, subd. (b); count two). In bifurcated proceedings before trial, defendant entered a plea of no contest to driving with a suspended license, a misdemeanor (§ 14601.2, subd. (a); count three). After trial, defendant admitted a prior prison term allegation (Pen. Code, § 667.5, subd. (b)) and two prior driving under the influence convictions.

Sentenced to state prison, defendant appeals. She contends the trial court abused its discretion in imposing sentence by failing to afford her individualized and reasoned consideration. In failing to do so, the trial court, defendant asserts, violated her right to due process.[1] We affirm the judgment.

FACTS

About 3:45 p.m. on September 6, 2006, defendant sat in the driver's seat holding the steering wheel of her van which was stopped in the middle of the road near the intersection of Watt and Winona. Defendant looked as if she was having a medical problem or was drunk. Two people from the corner gas station pushed the van out of the street.

Firefighters who arrived determined that there was nothing medically wrong with defendant who was sitting in the front area of the van. Her hair was "disheveled," she had on two different shoes and her pants were down. She had already urinated down the front of her pants and she said she needed to defecate.

A highway patrol officer smelled the odor of alcohol on her person and her breath. Her eyes were red and watery and her speech was slurred. The officer tried to administer several field sobriety tests but defendant's condition made it

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[1] In the opening brief, defendant states that she "also presents a jury instruction issue in order to preserve it for possible federal review." Defendant does not set forth this claim in a separate heading nor does she cite the instruction or offer any law or argument. The People note this discrepancy in their brief. Defendant does not even mention the point in her reply brief. Any such claim is forfeited.

difficult. A horizontal and vertical gaze nystagmus test indicated that defendant was under the influence. Defendant refused the preliminary alcohol screening test.

At 4:57 p.m. and 5:02 p.m., breath tests revealed defendant's blood alcohol levels were 0.10 and 0.11 percent, respectively. The parties stipulated that an expert would testify that defendant's blood alcohol level at 3:45 p.m. would have been between 0.12 and 0.13 percent.

Defendant told the officer at the scene that "a Black guy" she could not identify by name or further description had been driving the van when it broke down at noon and that the man left to get help. The officer did not believe her because he had driven through the same intersection 10 minutes before receiving the call and her van was not there. She explained she lived in the van with her husband since they were homeless. She also stated that while waiting for the man to return with help, she consumed a 40-ounce beer between noon and 2:00 p.m. The parties stipulated that an expert would testify that defendant's blood alcohol content could not have been as high as it was with one 40-ounce beer. The keys were in the ignition. Defendant admitted steering the van to the side of the road when the two men pushed her out of the intersection.

DISCUSSION

In rejecting the probation officer's recommendation of probation and imposing the upper term on count one, the trial court, defendant contends, abused its discretion in failing to afford her the reasoned consideration required in determining

the sentence to impose. Relying upon the trial court's closing comments to the jury, defendant claims the court "had made up its mind long before it had any information about [her]." She cites *People v. Dent* (1995) 38 Cal.App.4th 1726 (*Dent*) in support. Defendant also claims that the trial court, having prejudged her, violated her right to due process. We disagree.

After the jury reached its verdicts, the trial court commented without objection on several topics covering almost seven pages of reporter's transcript. We set forth the court's verbose comments in full in the margin below.[2]

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[2] The trial court commented as follows:

"Oftentimes jurors leave and they say, well, what happens now? Where does this matter go? I think I should tell you, there is a fair amount of information we did not give you because we didn't want the fact that she had previously been convicted of similar offenses to be in your mind. You think, well, maybe if she did it before, maybe she did it this time, and we wanted to make certain that you rendered a decision based only on what you saw and heard in this courtroom based on these two charges.

"I've been looking through the record, and it's a little hard to tell because sometimes teletype records are a little bit difficult to figure out. It does appear that she was previously convicted on September 25th of 1997 of a charge of driving under the influence, and the record shows that that was a felony, and in order for that to be a felony, since the section that she is convicted under does not indicate any injury or anything of that sort to anybody, that was probably a third offense.

"She was placed on five years probation, and as a condition of probation ordered to serve 300 days in the county jail, albeit that took place in Placer County.

"We also know she was convicted on September 28th of 1999 over in Placer County with some obligation of a prior, so it looks like that might have been the fourth conviction.

"We also know that she was convicted on February 17th of the year 2000 of a felony, and she was sentenced to state prison on that matter. However, the judge involved in that case

decided to suspend imposition of the prison sentence, and instead had her serve 365 days in the county jail.

"Then again on March 3rd of 2003 she was convicted of a felony charge of driving under the influence with prior convictions, and she was sentenced to serve time in state prison. I believe that was -- I forgot exactly what that was, whether that was probably three years and probably another 8 months, probably 44 months, and she did serve that term of imprisonment. So there [are] indications here that this might have been the seventh offense.

"On each of these matters previous to this she's been placed on probation and required to attend and complete a program designed to lead people away from addiction to alcohol and cause them to lead perhaps a more law-abiding life. So she had been to that program I don't know how many times. She had been placed on probation. She [had] been placed in custody.

"Here we have again with under [*sic*] the influence, and you are finding more than a .08 blood alcohol level. We didn't tell you to begin with that this is charged as a felony, not as a misdemeanor. So she's looking at state prison again.

"I've been at this for 33 years now, and a matter of this sort I find is very troubling. For instance, the state prisons are full of people. In fact, they are so full when you push one in this end, someone has to come out the other end. Same thing with jails. And most of the people that are in state prison are there because of addiction to dope of one sort or another. They either commit a crime to get the money to do this -- and there are matters involved, and I always felt putting a dope addict in prison doesn't really achieve a whole lot. We should be spending more of our dollars and efforts on rehabilitation. They need to go to kindergarten and start education, and a hard-hitting education all the way through school, and then when a person finds themselves [*sic*] addicted to a chemical, we should really make great efforts to deal with that person's addiction by treatment, whatever. And based upon my past experience, that's best performed by the private sector, not the government. When the government steps in, it usually makes a mess of it, and it usually doesn't work.

"So the addiction here is alcohol and not cocaine or whatever it may be. But she's been through the treatment programs how many times, we don't know, and it's failed. These are pretty good programs. You would think after a while a person would get the message.

"So unfortunately [defendant] falls into that category where I don't have any choice but to lock her up for as long as

we can, because there is a death in somebody's household waiting to happen. She doesn't have a license. She is driving on a suspended license, obviously doesn't have insurance. With that kind of alcohol and incident -- particularly in this particular matter. The vehicle came to rest in an intersection, whether it quit or out of gas or she stalled it or whatever. But luckily she didn't come to rest against another vehicle with some breadwinner dead, a mother, father, children deceased.

"Based upon my experience I feel compelled to take her off the street as long as we can, because I wouldn't want to take a chance on her again on probation, because she might have another drink, might get behind the wheel of a motor vehicle, and the consequences -- we just can't tell you the total -- we can't put a dollar value on the consequences that could happen when a drunk driver runs into somebody, kills them, maims them, hurts them, whatever.

"So she will be sentenced to serve some time in state prison. If everything comes together, it will actually be a total of -- well, it could be 44 months, and in addition, with another year added. It could be a particularly lengthy period of time, a minimum of 44 months. Perhaps a year longer. Fines don't mean anything. That just creates hardship. Programs, we know that hasn't worked, and nothing involved with that.

"So that's where this matter is going to go. I thought I should tell you, since this is a better part of your life. We do thank you all for being here. We know that everyone gave up something in order to be here, and important matters like [Juror No. 6 - Redacted] had things that needed your attention, other persons, other people, whatever incidents, employees, employers, whatever, and we just don't -- every time somebody pleads not guilty, we don't send a jury summons and say come down here. You have no idea of how many hundreds, thousands case [*sic*] of this sort, misdemeanors, felonies are filed in Superior Court. The vast majority of them resolve without the necessity of calling you folks to come down and go through this process. The vast majority are resolved -- some people think at election time this is a bad word -- with plea bargaining. If every charge that was filed had to go to a jury trial, there is not enough of you folks out there, and not enough jurors and lawyers and judges, and not enough courthouses to do that, so we make great efforts to resolve the matters before we send out the jury notice.

"In this particular matter it went up for what we call a pretrial hearing. Both the attorneys are present. The defendant is present. Everyone has had an opportunity to review

the reports of the arresting officer, determine if there's some way to resolve this matter without having you folks come in. Oftentimes the charge is reduced because it's a weak case. Sometimes the person said it's so obvious that I'll plead guilty to resolve it.

"I rather thin[k] [defendant], since they knew the possible consequences, she thought, well, it can't hurt to go to a jury trial. And who knows? Maybe somebody will forget or not remember, and maybe I will take advantage of that, and of course that didn't work.

"I am not going to turn to the attorneys for some comment because they echo my comments, and I'm sure you folks want to get out of here and get back with your lives.

"This is your courthouse. This is your community. These are your laws. I would hope that when you leave here you feel you had some positive involvement with the civics of your community. Without you folks to come down here and go through this process, all these matters would still be pending, hoping to get resolved and get to trial. So without you folks being here and the willingness and cooperation you've shown here, the criminal justice system can't function. So you are greatly appreciated.

"I have some good news, and I think I hinted once before during jury selection that if you are sworn as a trial juror, including an alternate, your name will not be back in the big hat from which they draw names for a total of twelve months, so it's all chance.

"Second, you are entitled to a certain compensation for being here. I'm embarrassed to tell you what it is, so I'll let you figure it out.

"You are also entitled to certain compensation for travel expenses one way. I never could figure that out. Are you supposed to come and sleep in your car in your lot, or under a tree somewhere? But in any event, of course you will get a check in the mail.

"Tim has some things he wants to discuss with you. Why don't you leave your notebooks. You will need to get part of your badges and things of that sort.

"Now, keep in mind that in the event you should be contacted in the future concerning what was important or how you arrived at your decision, you don't have to talk with anybody. We are going to direct that your addresses and identification will be sealed and not available to anyone without order of court.

When the court finished, the jury was excused and neither attorney remarked on the court's comments to the jury. Defendant focuses upon those topics in the court's comments that went beyond thanking the jurors for their service. Defendant cites the court's recounting from teletype records defendant's prior driving under the influence convictions; the court's stated intention to sentence defendant to state prison for as long as possible ["'So she's looking at state prison again . . . . I don't have any choice but to lock her up for as long as we can . . . . I feel compelled to take her off the street as long as we can. . . .'"]; and the court's implied intent to sentence longer based on defendant's decision to exercise her jury trial right ["'[Defendant], since they knew the possible consequences, she thought, well, it can't hurt to go to a jury trial'"].

"Now, if somebody comes, and the press, and they get to be difficult about this matter, let us know right away and we can take steps to put that to a screeching halt. And you are not to be subject to unwanted irritation because of your civic jury duty here.

"In the event -- we'll have a few more things to do, but if you care to wait for a few moments, one or other of the attorneys may want to talk with you for a few minutes in the hallway to find out what is important, what is not important. Again, you don't have to stay. The attorneys will come out and look if any of you are there and might want to have a conversation with them. I encourage you to do so, but you don't have to do any such thing. That's not part of the deal.

"We thank you. I love coming to Sacramento. And hopefully we'll see each other again under better circumstances. Thank you very much."

Bias or prejudice is a propensity to prejudge particular issues. (See, e.g., 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 115, 116, pp. 160-163.) We note that the record does not reflect that defendant ever availed herself of the statutory remedy for judicial bias, that is, a motion to disqualify the judge (Code Civ. Proc., § 170.1). Defense counsel heard the trial court's closing comments to the jury but never claimed then or prior to or at sentencing that the judge should recuse himself or that defendant's constitutional rights were violated because the judge had prejudged sentencing. "'It is too late to raise the issue for the first time on appeal.' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, (*Guerra*) disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) In any event, her belated claim of bias, even if not forfeited, is not supported by the record.

"Defendant has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. [Citation.]" (*Guerra, supra,* 37 Cal.4th at p. 1111.) A defendant can raise on appeal a "constitutionally based challenge asserting judicial bias." (*People v. Chatman* (2006) 38 Cal.4th 344, 362, italics omitted.) An objective standard applies and potential bias and prejudice must be clearly established. (*Id.* at p. 363.)

"Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias. [Citations.] Moreover, a trial court's numerous rulings against a party -- even when erroneous -- do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*Guerra, supra,* 37 Cal.4th at pp. 1111-1112; see also *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1231.) In discussing a federal statute related to recusal where impartiality might be questioned, *Liteky v. United States* (1994) 510 U.S. 540 [127 L.Ed.2d 474] explained, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Id.* at p. 555.)

Nothing in the record suggests the trial court harbored "deep-seated . . . antagonism that would make fair judgment impossible" (*Liteky v. United States, supra,* 51 U.S. at p. 555) nor does the record "'support a doubt regarding [the trial judge's] ability to remain impartial.'" (*People v. Chatman, supra,* 38 Cal.4th at pp. 363-364.) Defendant has highlighted comments taken out of context. We reject defendant's claim that the trial court imposed a harsher sentence because she chose to exercise her right to a jury trial. Reading the court's comments to the jury in context reflects that the court was referring to the thousands of cases resolved without trial.

Defendant ignores the court's comment that there had been "a pretrial hearing" to resolve the case short of a jury trial where reports of the arresting officer were reviewed. Defendant also ignores the fact that the matter of defendant's prior convictions and prior prison term were discussed in chambers and thereafter on the record before jury selection, but not with potential jurors. The court excluded and bifurcated the prior convictions and prior prison term allegations and later advised the jury, *after trial*, that it did so to protect defendant from inferences such as "maybe if she did it before, maybe she did it this time." The trial court also said it knew that at trial, there would be scientific evidence relating to blood alcohol content and the effect of alcohol on defendant, and, defendant entered her plea to the driving on a suspended license charge. As noted above, the court revealed information about defendant's record to the jury only after trial but it was information the court already knew based on evidence presented in the courtroom. The court also presided over the trial during presentation of the evidence. Thus, the court's comments were based on its knowledge of the case. Defendant has failed to demonstrate bias or prejudice.

The probation report prepared for sentencing included the information which the court had discussed with counsel and defendant prior to trial. Defendant's criminal history included convictions for vandalism, a misdemeanor, in 1989; two counts of driving under the influence, misdemeanors, in 1992; petty theft, a misdemeanor, in 1996; felony drunk driving in 1997; and felony

drunk driving in 2000. The probation officer noted at least two driving under the influence offenses had been purged. Defendant violated probation originally granted for the felony drunk driving offenses and was sentenced to state prison in February 2003. Defendant was paroled on July 2, 2003, had no parole violations, and was discharged on July 2, 2006. Two months later, she committed the current offenses.

The probation officer reported defendant was ineligible for probation pursuant to Penal Code section 1203, subdivision (e)(4), absent an unusual circumstances finding. The probation report listed three factors in aggravation: defendant had numerous driving under the influence convictions; she had served a prior prison term; and her prior performance on probation was unsatisfactory. The probation report listed one factor in mitigation: defendant's prior performance on parole was satisfactory. The probation officer also noted that defendant had taken positive steps by entering into a counseling program on her own and that imprisonment would have a significant negative impact on defendant. Without establishing a legitimate basis to conclude unusual circumstances were present pursuant to Penal Code section 1203, subdivision (e)(4), the probation officer recommended a grant of probation. Attached to the probation report were 10 personal reference letters and two program letters.

At sentencing, the court announced that it had read and considered the letters of reference, the program letters and the probation report and intended to reject the probation officer's

recommendation subject to argument.[3] Defense counsel sought probation but in the event that was denied, the low term for driving under the influence with the prior prison term stricken. The prosecutor sought the upper term plus the one-year enhancement for the prior prison term.

The trial court determined that defendant's case was not an unusual one warranting a grant of probation, noting that defendant had at least five prior driving under the influence convictions since 1991, previous grants of probation with time in county jail, and prior opportunities for rehabilitation including alcohol education and counseling, all to no avail. As reflected in the probation report, the trial court noted that in the driving under the influence offense in 1999, defendant had been driving on the opposite side of the road and almost crashed head-on with a patrol car. The trial court concluded defendant continued to drive while under the influence which demonstrated a degree of callousness towards those on the road. The court considered defendant to be like a "loaded gun." The court denied probation and sentenced defendant to state prison, imposing the upper term of three years on count one. The court

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[3] After stating it had read the probation report and the letters, each one by the name of the author, the court said: "The probation officer's made a recommendation, which I -- I am going to reject. [¶] So that's the starting point. [¶] With that in mind, does anyone wish to make any comment?" The court later stated that it had read all the letters, commenting, "[Y]ou know what they're gonna [*sic*] to say" but it had "read them anyhow just in case there's something new and different."

stated, "I just refuse to let you go back on the road. . . ." In aggravation, the court cited defendant's callousness, being "armed with a weapon . . . a 3,400-pound weapon that can cause death or serious injury," defendant's breach of trust of others on the road that she would obey the rules of the road, defendant's prior convictions which were increasingly serious, prior prison term, and unsatisfactory performance on parole and probation. The court found no factors in mitigation.[4]

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these

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[4] The court stated that it was "not gonna [*sic*] impose the extra one year" for the prison prior because "that's going a little bit too far." The court also stated that no sentence would be imposed for "count two [*sic*], the charge of driving on a suspended license." That was actually count three. The abstract of judgment reflects a stay pursuant to Penal Code section 654 for the actual count two, the driving with a blood alcohol content of 0.08 percent or more. No issues are raised with respect to the foregoing.

precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

The trial court's decision here, while, perhaps, excessive in wording, was not irrational or arbitrary. The record reflects the trial court considered and weighed the competing factors and concluded rationally that probation was not appropriate and defendant's record and callousness in committing the current offense required an upper term. All the factors suggesting leniency were before the court but it had the discretion to reject the same and did. We find no abuse.

Defendant's reliance upon *Dent* is misplaced. In *Dent*, the defendant shoplifted three bottles of liquor from a market. (*Dent, supra,* 38 Cal.App.4th at p. 1728.) An information charged him with second degree commercial burglary and petty theft with a theft-related prior (burglary), both wobblers, and further alleged five prior prison terms and three strike priors. (*Id.* at pp. 1728-1729.) The defendant plead no contest to the charged offenses and admitted all the allegations. (*Id.* at p. 1729.) At sentencing, the trial court expressed its "personal antipathy" for the three strikes law, stating "'[*t*]*he only way that I can avoid this law is to find this to be a misdemeanor*, which I do," and imposed a one year county jail term. (*Id.* at pp. 1729, 1731, original italics.) *Dent* reversed and remanded for resentencing, concluding that the trial court "impermissibly reasoned backwards from the sentence it wished to avoid to the

only available alternative" which "constitute[d] a failure to exercise discretion as required by the law" and "exceed[ed] the bounds of reason . . . ." (*Id.* at p. 1731.) *Dent* is clearly distinguishable. The court here did not reason backwards.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.